

¹ The corresponding transcript erroneously states this preliminary hearing was held February 5, 2009.

The sole issue raised on review is: Does claimant's need for surgery result from personal injury by accident arising out of and in the course of her employment?

FINDINGS OF FACT

Claimant worked for respondent as a daytime charge nurse. On July 30, 2009, she was assisting emergency medical technicians (EMTs) with transporting a resident to the ambulance. Claimant was walking and carrying bags in front of EMTs that followed her with the resident on a gurney. The resident was a large man weighing approximately 250 pounds and the gurney weighed almost 100 pounds. The EMTs attempted to take the resident off the curb, which caused the resident to fall forwards. Claimant twisted, caught the resident, and pulled enough to get the resident on his side. Claimant then assisted the EMTs in lifting the gurney back into an upright position. Immediately thereafter, claimant stepped up on the curb and felt a flash of pain and her right leg went numb.

At some point after her accident, unclear from the record, claimant was evaluated by Christopher S. Kent, M.D. Dr. Kent recommended a lumbar MRI.

On September 14, 2009, claimant was seen by Dr. Kent and his physician's assistant, Jenelle Rock. Claimant complained of low back and right lower extremity pain, right foot numbness and tingling, and mild urinary incontinence since mid-August, 2009. She also reported having underwent a bilateral laminectomy and L4-5 discectomy in 2002. Claimant testified she was essentially pain free within a few weeks after such surgery.

According to Ms. Rock, the lumbar MRI revealed some mild degenerative changes in claimant's lumbar spine that was greatest at L5-S1 where she had a mild broad-based disc herniation which did not appear to significantly compromise the spinal canal, lateral recess or neuroforamen. Dr. Kent reviewed the MRI and noted claimant had degenerative discs at L3-4, L4-5 and L5-S1, but that the central canal was opened at all levels.

Dr. Kent's September 14, 2009 report noted claimant's back pain was related to muscle strain secondary to her work accident and complicated by her morbid obesity, tobacco use, and chronic spinal degeneration. Dr. Kent saw no need for surgical intervention. Dr. Kent ordered an EMG and restricted claimant to not lift over 25 pounds, to limit bending and twisting, and to not work over four or five hours per day.

Claimant returned to Ms. Rock on October 1, 2009, with complaints of significant low back pain and numbness and weakness in her right lower extremity. Claimant reported occasional falls since mid-August, 2009.² The EMG showed chronic radicular changes on the right at L5 and S1 without any evidence of acute denervation.

² Claimant testified over three years later that she fell in excess of 300 times after her accident because her right leg gives out.

On November 4, 2009, Dr. Kent indicated that claimant's physical complaints started at the time of her work injury, but he could not explain the anatomical cause. Dr. Kent recommended claimant be seen by a neurologist and urologist.

Following a June 7, 2011 preliminary hearing, the prior administrative law judge assigned to this case, Bruce E. Moore, ordered an independent medical evaluation with Vito J. Carabetta, M.D. The court-ordered IME occurred July 20, 2011. Dr. Carabetta diagnosed claimant with neck and upper back pain, low back pain and right sciatica. Dr. Carabetta noted inconsistencies on physical examination and observed that some medical records refuted claimant's allegation that she was essentially pain free just weeks after her 2002 lumbar surgery. Dr. Carabetta opined claimant likely had a chronic lumbosacral and cervicothoracic sprain that occurred as a result of the work injury.

Dr. Carabetta deferred the determination of whether to proceed with a discogram to a spine surgery specialist. Dr. Carabetta provided restrictions of lifting no more than 25 pounds occasionally, lifting or carrying of not more than 10-15 pounds frequently, and occasional bending and stooping.

On August 8, 2011, Judge Moore ordered respondent to provide claimant a list of two qualified neurosurgeons from which she could select a doctor to evaluate her regarding whether a lumbar discogram was medically appropriate. Respondent provided the names of two physicians, Drs. Stein and Reintjes. Dr. Reintjes apparently was not willing to evaluate claimant. Thereafter, respondent added the name of Paul Arnold, M.D., a board certified neurosurgeon, to the list. Claimant chose to be evaluated by Dr. Arnold.

Dr. Arnold first examined claimant on January 3, 2012. Dr. Arnold noted that an MRI showed some possible stenosis in the lower lumbar region, but was of poor quality. Dr. Arnold recommended an additional lumbar myelogram and a post-myelogram CT.

Claimant returned to Dr. Arnold with the new myelogram and post-myelogram CT. In his February 21, 2012 report, Dr. Arnold indicated the films showed "congenital stenosis at several levels of the spinal canal." He recommended rehabilitation.

Claimant continued to receive treatment from Dr. Arnold. In May 2012, the possibility of surgery was discussed. At some unknown point, Dr. Arnold indicated surgery was "not a good option."³ However, by June 26, 2012, Dr. Arnold indicated claimant was interested in having surgery and she would need pre-operative clearance for a possible L3-4 laminectomy. While Dr. Arnold was the authorized treating physician,⁴ respondent did not authorize the proposed surgery.

³ P.H. Trans. (Nov. 5, 2012), Resp. 1 at 2.

⁴ *Id.* at 15.

In an August 9, 2012 letter, Dr. Arnold stated, "In my opinion it is unlikely the cognitive stenosis was the cause of her possible work injury of 2009."⁵

At the November 5, 2012 preliminary hearing, respondent's counsel advised Judge Fuller that Dr. Arnold opined claimant's need for surgery was due to a congenital problem and not related to a work injury. Judge Fuller stated that Dr. Arnold's letter did not indicate claimant's need for surgery was unrelated to her work injury. Judge Fuller ordered respondent to continue providing medical treatment with Dr. Arnold, including the proposed surgery. Respondent timely appealed.

PRINCIPLES OF LAW

The claimant has the burden of proof to establish by a preponderance of credible evidence her right to an award of compensation.⁶ Claimant must show the preponderance of the credible evidence supporting her position on an issue is more probably true than not true based on the entire record.⁷

A claimant's testimony alone is sufficient evidence of his or her physical condition.⁸ Medical evidence is not essential to establish the existence, nature and extent of a claimant's disability.⁹ To prove personal injury, it is not essential that there be visible proof of a lesion or change to the physical structure of the body.¹⁰

ANALYSIS

Both parties agree that the Appeals Board has jurisdiction. Whether claimant has a diagnosis and needs medical treatment directly attributable to her work-related accident is reviewable based on whether the diagnosis and medical treatment stem from an injury that arose out of and in the course of employment.¹¹

Whether claimant's need for lumbar surgery is due to her July 30, 2009 accidental injury is a close decision.

⁵ *Id.*, Resp. Ex. 1 at 2.

⁶ K.S.A. 2009 Supp. 44-501(a).

⁷ K.S.A. 2009 Supp. 44-508(g).

⁸ *Graff v. Trans World Airlines*, 267 Kan. 854, 863-64, 983 P.2d 258 (1999).

⁹ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 784, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

¹⁰ K.S.A. 2009 Supp. 44-508(e).

¹¹ *Byrum v. Kindsvater, Inc.*, No. 1,052,356, 2011 WL 2693261 (Kan. WCAB Jun. 24, 2011).

Respondent asserts Judge Fuller reversed the burden of proof and instead of requiring claimant to prove compensability, required respondent to prove the lack of compensability. Such argument is based upon Judge Fuller's statements that Dr. Arnold's report failed to state claimant's work injury did not cause her need for surgery. This Board Member does not conclude Judge Fuller required respondent to prove claimant's need for surgery was due to something other than her work injury. Judge Fuller did not reverse the burden of proof; she accurately stated that Dr. Arnold's letter only indicated claimant's work injury was not caused by her congenital stenosis, and that such letter did not address the relevant issue whether claimant's preexisting condition was aggravated, accelerated or intensified by her accidental injury.

Respondent argues Judge Fuller ignored the medical evidence. Dr. Carabetta opined claimant had a lumbar sprain or strain. He observed inconsistencies on physical examination. Dr. Carabetta indicated a discogram could potentially reveal a disk abnormality, but proceeding with such study should be up to a spine surgeon. Dr. Carabetta did not provide a surgical opinion. While Dr. Carabetta is a well-respected physiatrist, even if he voiced an opinion concerning claimant's need for surgery, it would be secondary to that of Dr. Arnold, a professor of neurological surgery.

Respondent argues Judge Fuller ignored Dr. Arnold's medical opinion. Respondent asserts Dr. Arnold found claimant's stenosis was not work related.¹² This Board Member does not agree and finds that Dr. Arnold's August 9, 2012 letter does not impact whether this case is compensable.

Dr. Arnold simply never addressed compensability under the parameters of Kansas law. Respondent's counsel stated at the Preliminary Hearing that Dr. Arnold's likely "intent" was to communicate that claimant's need for surgery was not due to her work injury and instead linked to unrelated congenital stenosis.¹³ Respondent's counsel further stated that Dr. Arnold's opinion was "perhaps not stated as cleanly as we might like it"¹⁴ Dr. Arnold did not state claimant's current need for surgery was or was not caused by her accidental injury or was or was not due to congenital stenosis. The relevant question is whether claimant's need for treatment was necessitated by a work injury or an aggravation, acceleration or intensification of a preexisting condition.¹⁵ Again, Dr. Arnold's letter does not address the question of compensability.

¹² Respondent's Brief at 4 (filed Dec. 3, 2012).

¹³ P.H. Tran. (Nov. 5, 2012) at 15.

¹⁴ *Id.*

¹⁵ *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 589, 257 P.3d 255 (2011).

Respondent also cites three Appeals Board cases, *Brooks*, *Tole* and *Stahl*,¹⁶ for the proposition that treatment for congenital spinal stenosis is not permitted. These three evidence-driven cases do not make blanket rulings that any accidental injury involving spinal stenosis is not compensable. Rather, in *Brooks*, *Tole* and *Stahl*, the respective claimants failed to prove that their accidents caused cervical spine stenosis, or aggravated, accelerated or intensified preexisting cervical spine stenosis. Claimants have proven compensable aggravations of preexisting stenosis,¹⁷ even in *Brooks*, where claimant had a compensable aggravation of lumbar spine stenosis, although his cervical spine stenosis was not so compensable.

Neither party submitted an expert medical opinion that claimant's proposed need for surgery was related to her otherwise compensable July 30, 2009 accidental injury. Based on the evidence, this Board Member concludes Judge Fuller's Order for Compensation should be reversed.

While claimant's testimony is sufficient to prove her physical condition, her testimony is insufficient to establish whether she needs lumbar surgery due to her July 30, 2009 accidental injury. Determining whether surgery should be performed, and why surgery is being proposed, is a decision that should be based on the opinions of medical professionals. The mere fact that Dr. Arnold, an authorized doctor, recommended surgery does not mean that such proposed surgery is a reasonable and necessary treatment occasioned by claimant's accidental injury. At this juncture, the Appeals Board does not know if Dr. Arnold is recommending surgery due to a congenital condition or whether he is recommending surgery for congenital lumbar spinal stenosis that was aggravated, accelerated or intensified due to claimant's compensable accidental injury.

All Dr. Arnold's August 9, 2012 letter established is that claimant's stenosis was unlikely to cause claimant's work injury. Such statement is staggeringly obvious and not helpful or relevant to determining if the need for the proposed surgery was caused by the 2009 accidental injury or if the 2009 accidental injury resulted in an aggravation, acceleration or intensification of a preexisting condition or if the need for surgery is unrelated to claimant's accidental injury. The Appeals Board is still left with a situation where there is no medical opinion that the proposed lumbar surgery is needed due to claimant's work injury. The claimant carries the burden of establishing that the need for surgery stems from her work injury. Based on the record as it currently exists, claimant has not carried her burden of proof.

¹⁶ *Brooks v. K.C. Flatwork Concrete, Inc.*, No. 1,034,525, 2011 WL 1330685 (Kan. WCAB Mar. 31, 2011); *Tole v. Cessna Aircraft*, No. 1,007,446, 2003 WL 21688459 (Kan. WCAB June 30, 2003); and *Stahl v. Mac Equipment, Inc.*, No. 229,115, 1999 WL 1113600 (Kan. WCAB Nov. 16, 1999).

¹⁷ See *Hackney, v. R. S. Andrews Enterprises of Kansas*, No. 1,031,297, 2007 WL 1390710 (Kan. WCAB Apr. 30, 2007); *Pack v. Superior Toyota*, No. 1,009,798, 2004 WL 764548 (Kan. WCAB Mar. 18, 2004).

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹⁸ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSION

WHEREFORE, the undersigned Board Member reverses Administrative Law Judge Pamela J. Fuller's November 5, 2012 Order.

IT IS SO ORDERED.

Dated this _____ day of January, 2013.

HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

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¹⁸ K.S.A. 44-534a.